Supreme Court, U.S.
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No. 08-578

IN THE

Supreme Court of the United States

JAMES A. KAY, JR.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 9(b) of the Administrative Procedure Act ("APA") provides:

> When the licensee has made timely and sufficient application for a *renewal or a new license* in accordance with agency rules, a license with respect to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c) (emphasis added).

In 1994, Petitioner filed two applications with the Federal Communications Commission ("FCC" or "Commission"), each one seeking consent to the assignment of the license for an existing mobile radio system station to Petitioner. The license terms expired while the assignment applications were pending. After retaining the assignment applications on file for an additional four years, the Commission dismissed without hearing on the grounds that the underlying licenses had expired. Under the procedures and regulations in effect at the time, the Commission made no significant distinction, whether in procedural requirements or substantive consideration, between assignment versus new applications for licenses of these type. Petitioner therefore asserted that the assignment applications were "renewal or new" applications within the meaning of Section 9(b) of the Administrative Procedure Act, thereby continuing the underlying authority, and were improperly dismissed.

The questions presented are:

1. Does Section 9(b) of the Administrative Procedure Act apply equally to license assignment and new applications in services where the agency's procedures and substantive considerations for the two types of applications are virtually indistinguishable from one another in any significant sense?

2. Was it improper for the Court of Appeals, in addressing this matter, to accept a rationale proffered by FCC appellate counsel that was not articulated by the agency itself in the decisions being appealed?

3. Is it unlawfully discriminatory for the agency to apply different standards to assignment and new applications in services where the agency's procedures and substantive considerations for the two types of applications are virtually indistinguishable from one another in any significant sense?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner, James A. Kay, Jr., is an individual who presently holds land mobile licenses authorized by the FCC under 47 C.F.R. Part 90. The FCC is the agency of the United States authorized by 47 U.S.C. §§ 308, 309 & 310(d) to receive and process applications for licenses to construct and operate such land mobile radio systems, as well as applications to modify, renew, or assign such licenses.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 525 F.3d 1277. Appendix A at 1a.

The orders of the Court of Appeals denying panel rehearing and rehearing en banc are unreported. Appendix J at 56a and 58a, respectively.

The FCC Notice of Dismissal (September 25, 2000) with regard to Call Sign WNXR8980 is unreported. Appendix I at 54a.

The FCC Notice of Dismissal (December 4, 2000) with regard to Call Sign WIK902 is unreported. Appendix H at 52a.

The FCC Memorandum Opinion and Order (DA 02-739; April 1, 2002) denying reconsideration of the dismissal of the assignment application for Call Sign WIK902 is reported at 17 FCC Rcd 5951 (WTB 2002). Appendix G at 41a.

The FCC Order (FCC 03-27; Feb. 11, 2003) denying review with regard to Call Sign WIK902 is reported at 18 FCC Rcd 2366 (2003). Appendix F at 34a.

The FCC Order (DA 01-2634; November 14, 2001) denying reconsideration of the dismissal of the assignment application for Call Sign WNXR890 is reported at 16 FCC Rcd 20183 (WTB 2001). Appendix E at 28a.

The FCC Memorandum Opinion and Order (FCC 03-84; April 17, 2003) denying application for review with regard to Call Sign WNXR890 is reported at 18 FCC Rcd 7585 (2003). Appendix D at 19a.

The FCC Order on Reconsideration (DA 04-443; February 20, 2004) denying review with regard to Call Sign WNXR890 is reported at 19 FCC Rcd 2938 (WTB 2004). Appendix C at 13a.

The FCC Order (FCC 05-131; Jun. 28, 2005) denying further reconsideration with regard to Call Sign WNXR890 is reported at 20 FCC Rcd 12228 (2004). Appendix B at 5a.

JURISDICTION

The judgment of the District of Columbia Circuit was issued on June 28, 2005. Appendix. A . Timely petitions for panel rehearing and rehearing en banc were denied on July 31, 2008. Appendix J. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following authorities are set forth in Appendix K.

1. Sections 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c). Appendix K at 60a.

2. Section 308 of the Communications Act of 1934, as amended, 47 U.S.C. § 308. Appendix K at 61a.

3. Section 309, subsections (a) through (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a)-(e). Appendix K at 64a.

4. Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d). Appendix K at 71a.

5. Section 90.119 of the FCC Regulations (as in effect in 1994), 47 C.F.R. § 90.119 (1994), App. 310(d). Appendix K at 72a.

STATEMENT OF THE CASE

The case involves two separate application proceedings before the Federal Communications Commission ("FCC" or "Commission") that were consolidated for joint briefing and argument in the Court of Appeals. The facts and legal issues in each case are virtually identical.

Petitioner, James A. Kay, Jr., is an individual who, directly or indirectly, presently holds FCC licenses for land mobile radio systems in the Los Angeles area, authorized by the FCC under 47 C.F.R. Part 90. In 1994, Petitioner filed applications seeking FCC consent, pursuant to Section 310(d) of the Communications Act of 1934, as amended, , 47 U.S.C. § 310(d), to the assignment of two such licenses from other licensees to Petitioner.[1] Each of these application proceedings followed the same pattern, namely, the expiration dates for the license arrived while the assignment application was pending. The Commission nonetheless retained the application on file for another four years before eventually dismissing it on the grounds that the underlying license had expired and the former licensee

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1. On April 11, 1994, Kay filed an application for FCC consent to the assignment of the license for Conventional UHF Industrial/Business Pool (IG) Station WIK902 from Francisco M. Padilla to Kay (the "Padilla Assignment Application"). In a separate and unrelated proceeding, on June 7, 1994, Kay filed an application for FCC consent to the assignment of the license for Conventional 800 MHz Specialized Mobile Radio Service (GX) Station WNXR890 from Vince Cordaro to Kay (the "Cordaro Assignment Application").

therefore had nothing to assign.[2] Petitioner filed timely requests for agency reconsideration and review, all of which were dismissed or denied, App. 5a-51a, and the Court of Appeals upheld the agency on appeal. App. 1a-4a.

Under Commission procedures in effect at that time applications for Commission consent to the assignment of most Part 90 land mobile radio licenses, including those at issue here, consisted of two elements: (a) an FCC Form 574 to be completed and executed by the assignee; and (b) a letter from the assignor attesting to its intent to assign all interest in the specified authorization (or, alternatively, and FCC Form 1046 executed by the assignor/licensee). *Section 90.119(a)(4) of the FCC Regulations as in effect in 1994*, 47 C.F.R. § 90.119(a)(4) (1994). It is not disputed that the assignment applications filed by Petitioner properly followed these procedures and were acceptable when filed. The grounds for dismissals was the that expiration dates on the subject licenses arrived while the assignment applications were pending.

The FCC Form 574, now obsolete, was in 1994 the standard application form used for Part 90 land mobile radio facilities licensing. The same information is

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2. On April 11, 1994, when the Padilla Assignment Application was filed, the license for Station WIK902 bore an expiration date of June 13, 1996. The FCC dismissed the assignment application on December 4, 2000, nearly four and a half years after the expiration date. App. 52a. On June 7, 1994, when the Cordaro Assignment Application was filed, the license for Station WNXR890 bore an expiration date of November 4, 1996. The Commission dismissed the application on September 25, 2000, nearly four years after the expiration date. App. 54a.

required whether the form is being used to apply for a new authorization or to take assignment of an existing authorization, the only difference being that, with respect to an assignment, the "Assignment" box would be checked at Item 32, the "previous call sign" would be entered at Item 36, and the letter or FCC Form 1046 executed by the licensee would be attached.

The assignor's portions of an assignment applications tendered on FCC Form 574 was virtually indistinguishable in form and substance from an application for new facilities. This was not merely a procedural fluke or an administrative coincidence, but rather seems to have been deliberate. The similarity between an assignment versus a new application is explicit in the Commission's detailed instructions for completing the FCC Form 574. The following guidance appears under the section labeled *Item 32 – Reason for Filing*:

> Assignment of Authorization. . . . Prepare the application in your own name and complete it in the same manner as for a new station with all questions answered and include a detailed statement of your eligibility for Item 31.

FCC Form 574 Instructions. App. 78a. The form itself asks of for a comprehensive listing of station technical parameters, *e.g.*, geographic coordinates, site elevation, antenna and support structure height, operating frequencies, emission designators, output and effective radiated power, etc.

The instructions go on to emphasize the "newness" of the assignee's application on FCC Form 574 vis-à-vis the assignor's existing authorization:

> Include a letter from the assignor meeting the requirements of the Commission's Rules. For your convenience, FCC Form 1046, "Assignment of Authorization" may be obtained from any Commission office for this purpose."

App. 78a. The phrase, "requirements of the Commission's Rules," refers to the 1994 version of Section 90.119(b)(4) of the FCC Regulations which provides, in pertinent part:

> For the Commission's consent to the assignment of an authorization . . . , the application shall be accompanied by a letter from the assignor setting forth his desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and that the assignor will submit his current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

47 C.F.R. § 90.119(a)(4) (1994). The FCC Form 1046 itself includes the following statement placed conspicuously above the space where the licensee/assignor is to date and sign the document:

> My authorization will be submitted to the Commission for cancellation upon completion of the assignment. This certifies that the

> assignee intends *to continue the activity* for which I demonstrated original eligibility.

Certification, FCC Form 1046, Assignment of Authorization (emphasis added), contained in each of the assignment applications filed with the FCC.

These procedures transcend the mere clerical assignment of an existing authorization from one party to another. While couched in terms of a license assignment, the assignee is asked to prepare and submit a comprehensive self-contained application to authorize the facilities in its own name, upon the grant of which, the assignor is asked to cancel its own license. The "new" license issued based on the Form 574, is expressly intended to authorize the assignee "to continue the activity for which" the assignor had been previously licensed. When seen in this light, the FCC Form 574 as used in a 1994 license assignment application unmistakably emerges as an "application for a renewal or a new license . . . with respect to an activity of a continuing nature."

REASONS FOR GRANTING THE PETITION

A. This Case Involves a Key Provision of the Administrative Procedure Act.

Section 9(b) of the Administrative Procedure Act ("APA") provides, in pertinent part:

> When the licensee has made timely and sufficient application for a renewal *or a new license* in accordance with agency rules, a license with respect to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c) (emphasis added). Each of the FCC applications subject to this appeal was entitled to the protection of this statutory provision, and was therefore improperly dismissed.

The Supreme Court has explained the circumstances in which this provision applies, essentially identifying four elements, as follows:

(1) "[T]here must be a license outstanding;"

(2) "it must cover activities of a continuing nature;"

(3) "there must have been a timely and sufficient application to continue the existing operation; and"

(4) "the application for the new or extended license must not have been finally determined."

Pan-Atlantic Corp. v. Atlantic Coast Line, 353 U.S. 436, 439 (1957). There is no question that the first, second, and fourth elements are satisfied in this case. Each of the licenses in question was outstanding and in force at the time the applicable assignment of license application was filed; each authorized activities of a continuing nature; and up to the dismissals being challenged in this appeal, there had been no final action on "the application for the new or extended license." The dispute regards the third element, namely, whether the assignment of license application in each case properly constitutes "a timely and sufficient application to continue the existing operation." Petitioner submits that this question must be answered in the affirmative, based in no small measure on the Commission's own characterization of the applicable license assignment application procedures.

Under the land mobile regulations and licensing procedures applicable in 1994, an application for Commission consent to assignment of a license is properly deemed an "application for a renewal or a new license . . . with respect to an activity of a continuing nature," for purposes of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c). The Commission's dismissal of the assignment applications on the grounds that the underlying licenses had expired was therefore improper. The relevant provision in Section 9(b), by its very terms, presumes a license that is beyond its authorized term. The Commission's

rejection of the assignment applications because they are not specifically "renewal" applications too narrowly reads the statute, which expressly includes, in addition to renewals, "application[s] for . . . new license[s]."[3]

The Court of Appeals also failed to follow its own precedent regarding interpretation of Section 9(b) of the Administrative Procedure Act. The FCC had asserted below that Section 9(b) does not preserve an authorization that expires on its own terms. But when the FCC advanced essentially the same argument in a prior case, the Court of Appeals rejected it.

> [W]e reject a view of [Section 9(b) of the APA] offered by the [Federal Communications] Commission, that is plainly wrong. Citing language from . . . *Atlantic Richfield Co. v. United States* . . . , the Commission argues that the provision affords no protection to a license that expires by its own terms. . . . [T]he third sentence of § 558(c) supplies continuity in instances where a licensee is seeking "renewal or a new license" and the agency has not gotten around to the issue. Thus *it plainly assumes a license that would naturally have lapsed in the absence of affirmative agency action—but for the intervention of § 558(c). The sentence would*

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3. The Commission's 1994 procedures are, moreover, entirely consistent with the applicable statutory requirements. Section 310(d) of the Communications Act provides that an assignment application must "be disposed of as if the proposed transferee or assignee were making [a new] application . . . for the permit or license in question," 47 U.S.C. § 310(d).

> *be a nullity if inapplicable to any permit that expires by its terms.*

Miami MDS Co. v. FCC, 14 F.3d 658, 659 (D.C. Cir. 1994) (emphasis added). That *Miami MDS* enunciates a correct reading of Section 9(b), and that the Commission's argument accepted by the Court of Appeals in this case is circular reasoning leading to an absurd result, is clear from the statute itself. Section 9(b) assumes the fact of a license expiration, *i.e.*, the arrival of a license expiration date, during the pendency of an application, and is designed precisely to preserve the effectiveness of the authority notwithstanding the expiration. This Court should clarify this principle, and reaffirm the correct reading presented in *Miami MDS*.

B. The Decision Below Violates this Court's *Chenery Doctrine*, a Fundamental Principle in Judicial Review of Agency Decisions.

The Court of Appeals decision was based in part on an argument advanced by FCC counsel on appeal, namely, that Section 9(b) of the Administrative Procedure Act does is restricted to "renewal or new applications" filed by the licensee to continue its existing license, and not to an application by proposed assignee. Apart from the fact that this argument is wrong on its merits, it may not properly be the basis for affirming the agency action because it was not articulate by the FCC itself in rendering its decision.

The Commission did not dismiss the applications because Petitioner was not the existing licensee, but rather because the assignment applications were not,

in its view, "renewal or new" applications within the meaning of Section 9(b), and because that sought the assignment of existing licenses rather than their replacement by new licenses. In other words, the Commission's rationale was based on the nature of the applications, not the identity of the applicants.

The FCC's argument therefore may not be invoked in this proceeding. "The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . For the courts to substitute . . . counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

C. The FCC Action is Unlawfully Discriminatory and Applies Unequal Regulatory Treatment to Similar Situated Applicants

It is a well and long-established axiom that the FCC may not arbitrarily discriminate between similarly situated licensees in the adoption and application of its regulations, policies, and procedures. *Melody Music v. FCC*, 345 F.2d 730, 732-733 (D.C. Cir. 1965); *Tel. & Data Sys. v. FCC*, 19 F.3d 655, 657 (D.C. Cir. 1994). Indeed, all aspects of the Commission's exercise of its regulatory power is subject to the Constitutional requirement of equal protection of the laws. *E.g.*, *Lutheran Church–Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993).

In summarily dismissing the assignment applications, the Commission deprived Petitioner of its statutory hearing rights. Section 309(a) of the Communications Act provides:

> [I]f the Commission, upon examination of [a Title III radio] application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (emphasis added). Section 309(e) further provides:

> If, in the case of any application . . . a substantial and material question of fact is

> presented or the Commission for any reason is unable to make the finding specified in such subsection, *it shall formally designate the application for hearing*. . . . Any hearing subsequently held upon such application shall be *a full hearing in which the applicant . . . shall be permitted to participate*.

47 U.S.C. § 309(e) (emphasis added).

These statutory provisions apply to applications for consent to assign or transfer control of licenses as well as applications to initially authorize facilities or to renew or modify licenses. Section 309(e) governs "any application to which subsection (a) . . . applies, and Section 309(a), in turn, applies to "each application . . . to which section 308 of this title applies." 47 U.S.C. § 309(a) & (e). Section 310(d), moreover, expressly makes Section 309 applicable to assignment and transfer applications. 47 U.S.C. § 310(d). See, generally, Sewell, Stephen F., *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 287-288 & 290-294 (1991).[4]

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4. Section 310(d) does, however, expressly exclude assignment and transfer applications from the scope of any comparative consideration under the *Ashbacker* doctrine, *Ashbacker Radio Corp. v.FCC*, 326 U.S. 327 (1945): "[T]he Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." 47 U.S.C. § 310(d).

Petitioner could have filed an application for a new license, coupled with the existing licensee's consent to the proposed "short-spacing" of co-channel stations and commitment to later cancel its own license. It is unfairly discriminatory Petitioner to be penalized for seeking to implement by license assignment process precisely the same transactions that others are permitted to do by the short-spacing consent plus license cancellation scheme.[5] The two methods not only accomplish the same result, they do so in a virtually identical procedural manner.[6] In every substantive and significant way they are indistinguishable from one another, and should not therefore be treated differently. The decisions below are thus at odds with fundamental principles of fairness, due process, and equal protection.

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5. The Commission recognizes and freely endorses the use of short-spacing consent agreements as a valid regulatory and licensing mechanism in the land mobile radio services. *E.g.*, *Daniel R. Goodman, Receiver*, 13 FCC Rcd 21944, 21968-21970 (1998); *Hawaiian Wireless Partners*, 11 FCC Rcd 21192, 21994 n.11 (WTB 1996); *Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees*, 6 FCC Rcd 4929 (1991).

6. As previously discussed, the FCC Form 574 forming the assignee's portion of an assignment of license application is virtually indistinguishable in any significant respect from the FCC Form 574 submitted to apply for a new authorization. As to the existing licensee's end of the transaction, a contractual undertaking to cancel the authorization in favor of the new license is substantively equivalent to the assignor's certification, on FCC Form 1046, the "authorization will be submitted to the Commission for cancellation," thereby enabling the assignee to "continue the activity" previously authorized by the cancelled instrument. Indeed, the instructions for completing the FCC Form 574, App. 78a, allow assignment application the option of using a Form 1046 or a letter.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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